



## REPORT FOR ACTION WITH CONFIDENTIAL ATTACHMENT

### Supplementary Report Regarding Suspension of Four Seasons Site Development Ltd.

**Date:** May 17, 2017

**To:** City Council

**From:** City Solicitor

Deputy City Manager & Chief Financial Officer

Chief Engineer & Executive Director, Engineering & Construction Services

Chief Purchasing Official & Director, Purchasing & Materials Management

**Wards:** All

#### **REASON FOR CONFIDENTIAL INFORMATION**

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This report is about litigation or potential litigation that affects the City. This report also contains advice or communications that are subject to solicitor-client privilege.

#### **SUMMARY**

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On May 1, 2017, the Divisional Court set aside the February 9, 2017 decision of the City's Chief Purchasing Official ("CPO") to suspend Four Seasons Site Development Ltd. ("Four Seasons") for 6 months or until the matter was considered by City Council. The issues canvassed by the Divisional Court are summarized below. Legal advice with respect to the implications of the decision is set out in the Confidential Attachment.

As a result of this decision, Four Seasons was not restricted from submitting bids on City tenders closing in May, 2017 prior to this meeting of Council.

On May 3, 2017, Four Seasons submitted bids in response to Tender Call 122-2017, Permanent Repairs to Utility Cuts on Collector /Local Roads, Wards 8, 10, 23 North York District, and Tender Call 123, Permanent Repairs to Utility Cuts on Collector /Local Roads, Wards 24, 33, 34 North York District (together the "Utility Cut Tenders"). When the bid prices were read out at the tender closings on May 3, 2017, Four Seasons' bid price was the lowest.

The City has not yet completed its evaluation of the bids submitted in response to the Utility Cut Tenders and, therefore, has not yet made any recommendation regarding the potential award of any contracts.

Between the date of this report and Council's consideration of it, Four Seasons may submit the low bid on other construction related tenders.

If City Council adopts the recommendation of the Government Management Committee made on May 1, 2017 and declares Four Seasons ineligible to bid on or be awarded any tender calls, one result will be that Four Seasons will not be eligible to be awarded the Utility Cut Tenders or other contracts.

In addition, on May 10, 2017, Four Seasons commenced another legal action alleging that the Chief Purchasing Official acted in bad faith when he decided to suspend Four Seasons on February 9 and recommended that Council suspend Four Seasons. Legal advice with respect to this action is also set out in the Confidential Attachment.

## **RECOMMENDATIONS**

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The City Solicitor, Deputy City Manager & Chief Financial Officer, Chief Engineer & Executive Director, Engineering & Construction Services, and Chief Purchasing Official & Director, Purchasing & Materials Management recommend that:

1. City Council declare and direct that, if suspended, Four Seasons is ineligible to be awarded the contracts for:
  - a. Tender Call 122-2017, Permanent Repairs to Utility Cuts on Collector/Local Roads, Wards 8, 10, 23 North York District;
  - b. Tender Call 123-2017, Permanent Repairs to Utility Cuts on Collector /Local Roads, Wards 24, 33, 34 North York District; and
  - c. Any other procurements between the date of this report and Council's consideration of the matter on May 24, 25 and 26, 2017 in respect of which Four Seasons is low bidder but which have not been awarded.
2. Council direct that Confidential Attachment 1 remain confidential indefinitely as it contains advice that is subject to solicitor-client privilege.

## **FINANCIAL IMPACT**

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There is no financial impact from these recommendations.

## **DECISION HISTORY**

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The decision history is set out in the report dated April 25, 2017, which was considered by the Government Management Committee at its meeting on May 1, 2017.

## **ISSUE BACKGROUND**

### **i. Four Seasons' Application for Judicial Review**

On March 29, 2017, Four Seasons delivered a notice of application for judicial review. In this application, Four Seasons' sought an order to, among other things:

- a. set aside the CPO's February 9, 2017 decision suspending it from bidding upon or being awarded City contracts;
- b. prevent City Council from suspending Four Seasons from being eligible to bid and be awarded construction contracts; and
- c. quash the City's October 5, 2016 decision to terminate Contract 16ECS-T1-11SP, Sidewalk Construction and Streetscape Improvements on College Street (the "College Street Contract").

### **ii. Four Seasons' Motion to Lift the CPO's Decision to Suspend It**

On Monday, April 24, 2017, Four Seasons brought a motion for an interim order staying the CPO's decision to suspend it.

This was a motion to deal only with one specific issue (item a. above) raised in the notice of application. None of the other issues raised by Four Seasons in its notice of application have yet to be considered by the court.

On this motion, Four Seasons' argued that the CPO was wrong and had acted improperly when he decided to suspend it on February 9, 2017. Four Seasons argued that it was urgent that the Court hear the motion to set aside the CPO's decision so that Four Seasons could bid on tenders closing in May and, therefore, the Divisional Court heard this motion on Friday, April 28, 2017. On Monday, May 1, 2017, Madam Justice Kiteley granted the motion and ordered that the CPO's decision to suspend Four Seasons was stayed.<sup>1</sup>

In her ruling, Madam Justice Kiteley held that there was a strong *prima facie* case that the CPO only has authority to suspend contractors who have contravened the Supplier Code of Conduct.<sup>2</sup> Since the Supplier Code of Conduct only came into force on January 1, 2017, the CPO did not have authority to suspend Four Seasons as a result of poor performance or poor CPE scores for performance of contracts in 2016.

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<sup>1</sup> Four Season Development Ltd. v. City of Toronto, 2017 ONSC 2687

<sup>2</sup> Divisional Court Decision, May 1, 2017, para. 24; Toronto Municipal Code, Chapter 195, Purchasing, Article 13

Second, on the basis of Four Seasons' evidence that it had previously been awarded substantial contracts by the City and that it was suffering business, reputational, and other losses as a result of its inability to bid on or be awarded current or future City contracts, the Court was satisfied that Four Seasons had and would continue to suffer irreparable harm if the stay was not granted.<sup>3</sup>

Finally, the court held that the balance of convenience also favoured Four Seasons.<sup>4</sup> The Court held that, even if the CPO's suspension of Four Seasons was lifted, the result was simply to revert to the procedures in place before January 1, 2017 by which Council would decide whether to suspend any contractor. Moreover, the Court was aware that a report to Council, through the GMC, recommending a further suspension of Four Seasons was to be considered at GMC's May 1, 2017 meeting and that Council would be meeting on May 24, 25, 26, 2017.<sup>5</sup>

### **iii. Four Seasons Permitted to Bid on City Tenders Effective May 1, 2017**

The Court's decision was received by the City at 11:57 a.m. on May 1, 2017. As a result of the decision, Four Seasons has been legally permitted by the Court to bid on City tenders on and since May 1 and will continue to be permitted to bid on City tenders pending any decision by Council to accept or modify the recommendation of GMC.<sup>6</sup>

On May 3, 2017, Four Seasons submitted bids in response to the Utility Cut Tenders:

- a. Tender Call 122-2017, Permanent Repairs to Utility Cuts on Collector /Local Roads, Wards 8, 10, 23 North York District, and
- b. Tender Call 123, Permanent Repairs to Utility Cuts on Collector /Local Roads, Wards 24, 33, 34 North York District.

As indicated above, Four Seasons' bid price was the lowest price read out at the public opening of bids when the tender closed on May 3, 2017.

As at the date of this report, the City has not yet completed its evaluation of the bids submitted in response to the Utility Cut Tenders.

A contract may not be awarded after the close of any tender until the City is satisfied that the successful bid complies with the tender terms. Among other things, the terms of these tenders provide that "acceptance of any bid is subject

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3 Divisional Court Decision, May 1, 2017, para. 28

4 Divisional Court Decision, May 1, 2017, para. 31

5 Divisional Court Decision, May 1, 2017, para. 16, 17, 33

6 If Council rejects the recommendation of GMC, Four Seasons will continue to be permitted to bid on City tenders.

to further review by the City”<sup>7</sup> and the City is not obliged to accept any bid submitted.<sup>8</sup>

The Utility Cut Tenders also provide that contractors are required to maintain a satisfactory performance rating on contracts with the City and the City may verify past performance of bidders on relevant City projects. “Relevant City projects” include any construction projects involving road resurfacing or repair, streetscape improvements, and/or the construction, repair or maintenance of infrastructure in the City’s rights of way. This is because, although specific technical requirements for all or portions of any work to be completed may differ substantially from one contract to another, there are significant commonalities. For example, all contractors are required to communicate and interact appropriately with the community, provide regular and detailed scheduling information to appropriate City staff, and prepare and implement appropriate pedestrian and traffic management plans. These measures are all required to ensure public safety and a minimum of disruption in any area where work is being carried out, although specific requirements are tailored for each project and location.

Based on the issues articulated in the report dated April 25, 2017 and the information provided by deputants at the Government Management Committee meeting on May 1, 2017, staff advise that they are concerned that Four Seasons is not a qualified bidder and are continuing their evaluation of the bids received in response to the Utility Cut Tenders.

Four Seasons will not be eligible to be awarded the Utility Cut Tenders when the City does complete its evaluation if City Council adopts the recommendation of the GMC and declares Four Seasons ineligible to bid on or be awarded any tender calls. This will also be the situation in respect of any other similar tenders closing on or before Council’s meeting on which Four Seasons is the low bidder.

#### **iv. Four Seasons’ Claim for Misfeasance in Public Office**

On May 10, 2017, Four Seasons served a statement of claim upon the City seeking damages of \$30 million and alleging, among other things, reputational damage and “misfeasance” (i.e. deliberate improper use of authority) by the CPO. Further comments respecting this matter are contained in Confidential Attachment 1.

The City Solicitor’s office, in consultation with Purchasing and Materials Management and ECS, is currently preparing a statement of defence in response.

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<sup>7</sup> Utility Cut Tenders, p. 1

<sup>8</sup> Utility Cut Tenders, Section 1, Tender Process Terms and Conditions, section 16, p. 1-11

## **COMMENTS**

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Confidential Attachment 1 provides legal advice on the issues arising from the court's decision and in relation to Four Season's statement of claim.

## **CONTACT**

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## **SIGNATURE**

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## **ATTACHMENTS**

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Attachment 1: Confidential Attachment